United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2683

To be argued by
KENNETH R. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2683

JOHN ZITO,

Appellant,

—v.—

CASPAR WEINBERGER,
Secretary of Health, Education and Welfare, et al.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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Statement of the Case

This action was commenced by the plaintiff on July 22, 1974, alleging that he was denied due process because his retirement insurance benefits, 20 C.F.R. § 404.303, were reduced without first affording him a hearing. The plaintiff sought mandamus, injunctive and declaratory relief. Plaintiff was denied relief by the United States District Court, Newman, *J.*

On July 31, 1974, Judge Newman approved an agreement between the parties, whereby the plaintiff would continue to receive the full amount of his retirement benefits pending the outcome of a reconsideration determination regarding plaintiff's eligibility for the waiver of an overpayment. During reconsideration, the Social Security Administration (Administration) determines whether a recipient has a right to have his obligation to repay an overpayment waived. 20 C.F.R. § 404.910.

On August 26, 1974, the plaintiff filed a Motion for Certification as a Class Action, even though he had been granted temporary relief by the Secretary of Health, Education and Welfare.

By letter dated September 4, 1974, the Secretary notified the plaintiff that the overpayment would be entirely waived.

On November 15, 1974, Judge Newman denied plaintiff's motion for certification as a class action, and granted defendant's motion to dismiss.

On December 13, 1974, a notice of appeal from the judgment was filed with the United States Court of Appeals for the Second Circuit.

Statement of Facts

Plaintiff was notified in February, 1972, that because of an overpayment he had received in Social Security benefits, his future payments would be reduced. The overpayment was through no fault of the plaintiff.

Under the provisions of the Social Security Act, a recipient between the ages sixty-two and seventy-two is allowed to work and receive benefits simultaneously. 20 C.F.R. § 404.303 However, the recipient's annual earnings cannot surpass a specified amount. If the recipient's earnings exceeded the specified amount, the Administration would institute proceedings to recover the payment made in excess of the entitlement. 20 C.F.R. §§ 404.415, 404.416

Plaintiff filed his 1971 Annual Report of Earnings on January 27, 1972. His reported annual earnings were approximately Four Thousand Seven Hundred 00/100 Dollars ($4,700.00), as he had worked every month except

November and December. Said earnings resulted in an overpayment of Eight Hundred and Twenty-Nine 60/100 Dollars ($829.60) in retirement benefits. Plaintiff was notified of the overpayment on February 15, 1972.

Plaintiff thereupon contacted the District Office of the Social Security Administration in Stamford, Connecticut. An agreement was reached whereby plaintiff's benefits would be reduced Twenty-Five 00/100 Dollars ($25.00) per month. However, according to Social Security regulations, recovery must be made within thirty-six (36) months; thus, his benefits were reduced Twenty-Seven 00/100 Dollars per month beginning February, 1972. 20 C.F.R. § 404.502

In January of 1973, Social Security benefits were increased. The plaintiff's benefits were also increased. However, by mistake, instead of applying the increased benefit rate to the amount due the plaintiff (now adjusted by agreement), the rate was erroneously applied to the full benefit amount.

This mistake was not discovered until May of 1974, and it was attributed to computerized action. As a result of the error, the Social Security Administration stopped withholding the overpayment. The plaintiff was notified by letter dated May 23, 1974, of the mistake, and that the Administration would resume partial withholding of Twenty-Seven 00/100 Dollars ($27.00) per month from June, 1974 through December 1975 and Nineteen 60/100 Dollars ($19.60) in January, 1976. These deductions were necessary in order to recover the Five Hundred and thirty-Two 60/100 Dollars ($532.60) remaining overpaid and unreimbursed.

As a consequence, the plaintiff filed for reconsideration of the overpayment on June 7, 1974, with the Social Security Administration. The Administration thereupon

examined the possibility of waiving the adjustment of the overpayment. On September 4, 1974, the Secretary of Health, Education and Welfare (under whose auspices is the Social Security Administration) notified plaintiff that the overpayment was waived because he was found "without fault" and that recovery would be "against equity and good conscience." 20 C.F.R. § 404.506-404.510, 404.512.

Questions Presented

1. **Did the Court Err in Ruling that the plaintiff's Claim for a Pre-Reduction Hearing was Moot?**

2. **Did the Court Err in Denying the Plaintiff's Motion for Certification as a Class Action?**

ARGUMENT

POINT I

Plaintiff's claim for a pre-reduction hearing was moot.

On September 4, 1974, the Secretary of Health, Education and Welfare waived recoupment of the overpayment of benefits previously paid to the plaintiff. This decision was favorable to the plaintiff.

Because recoupment was waived, no dispute presently exists between the plaintiff and the Social Security Administration. The plaintiff currently receives and since September, 1974, has received full Social Security retirement insurance benefits and has and will not be required to return the overpayment. Consequently, there is no relief which the Court can render to him. Nor is there any real issue affecting the plaintiff's rights for this Court to resolve.

It is well settled that Article III of the Constitution imposes a "threshold requirement . . . that those who seek to invoke the power of federal courts must allege an actual case or controversy." *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974); *Flast* v. *Cohen*, 392 U.S. 83, 94-101 (1968); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-425 (1969) (majority opinion of Marshall, *J.*). To satisfy the requirement of "case or controversy," the plaintiff must allege "some threatened or actual injury," *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973) that is "real and immediate" and not conjectural or hypothetical. *Golden* v. *Zwickler*, 394 U.S. 103, 108-109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-91 (1947). Furthermore,

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. *Flast* v. *Cohen*, *supra*, at 99-100.

Upon a close examination of the cases cited by the plaintiff concerning a claim to a pre-reduction hearing, it is apparent that this line of cases is distinguishable from the matter at hand. Here, that which was the cause of the plaintiff commencing suit, the recoupment of the overpayment of benefits, has been relinquished by the Social Security Administration. No longer is there an issue between the plaintiff and the Administration. This distinction was also recognized by the District Court in the opinion of Judge Newman in which it was stated,

> However, H.E.W. has gone further. It has abandoned all attempts to recoup the overpayments, thereby removing the factual dispute as to which plaintiff asserts his right to a pre-reduction hearing. At this time there is no dispute between plaintiff and the Department at all. Zito's present fears are without substance; he is no more likely to experience a further reduction in benefits, with or without a hearing, than any other Social Security recipient. With the dispute as to amount of benefits ended, his suit to establish a right to a pre-reduction hearing is moot. (2a).*

Plaintiff further asserts that the removal of the particular threat or danger which initially prompted the filing of the lawsuit is not sufficient to warrant dismissal on the grounds of mootness. As authority, he cites *Treves* v. *Servel Inc.*, 244 F. Supp. 773, 777 (S.D.N.Y. 1965); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); and *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). These cases are not applicable to the case at bar. In *Moore* v. *Ogilvie*, *supra*, and *Southern Pacific Terminal Co.* v. *ICC*, *supra*, the controversy was held not to be moot because the questions presented were "capable of repetition, yet evading review." In the previously mentioned cases, the named

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* Reference marked "A" refers to the Government's Appendix.

plaintiffs' personal stake in the litigation continued throughout the entirety of the litigation. In the present situation, the plaintiff's personal stake in the litigation ended once the Administration decided to waive the recoupment of the overpayments.

The instant case is controlled by *Sosna* v. *Iowa*, — U.S. —, 43 U.S.L.W. 4125 (January 14, 1975). In *Sosna*, the appellant was contesting Iowa's residency requirement for divorce purposes. It established the principle that a case can only be maintained if it was properly certified as a class action under Rule 23, Federal Rules of Civil Procedure, that an actual controversy exists between the plaintiff and the defendant and that the issue between the parties can arise again and evade review unless resolved by the Court. The rational behind this principle is that once the District Court certifies a case as a class action, the class of unnamed persons described in the certification acquires a legal status separate from the interest asserted by the plaintiff. This view was a significant factor in determining mootness. *Sosna* v. *Iowa, supra.* The District Court never certified the case at hand as a class action; on the contrary, the Court denied certification as a class action on November 15, 1974.

Another case in point is *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, — U.S. —, 43 U.S.L.W. 4238 (February 18, 1975). There, plaintiffs brought a suit as a class action pursuant to Rule 23(a) and (b)(2) of the Rules of Civil Procedure. The United States Supreme Court held:

> . . . The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initial named plaintiffs prior to the exhaustion of appellate review. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs, supra,* at 4238.

The Supreme Court ruled that compliance was not adequate with the requirements of Rule 23(c), thus it concluded that the case was moot. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs, supra,* at 4238.

Accordingly, this action is moot with respect to the named plaintiff.

POINT II

The trial court did not err in denying the plaintiff's motion for certification as a class action.

Plaintiff claims that even if the matter is moot as to himself he is entitled to litigate on behalf of the class. A class action pursuant to Rule 23(a) must have a class and a proper representative. *Hamer* v. *Campbell,* 358 F.2d 215, 219 (5th Cir. 1966). To sue on behalf of others, the representative party must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). However, in cases where the inadequacy of the named representative's claim has become apparent prior to class certification, the Supreme Court has been emphatic in rejecting the argument that the class action could still be pursued. *O'Shea* v. *Littleton, supra,* at 494-495; *Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962); *Hall* v. *Beals,* 396 U.S. 45, 48-49 (1969).

The facts of this case demonstrate that the plaintiff no longer represents the class. When the suit was initially filed, the plaintiff had a valid dispute with the Social Security Administration. Additionally, he alleged that there were other recipients who had similar disputes with the agency; and he therefore sought certification as a class action. However, the plaintiff received a favorable determination for waiver of the recoupment of the overpayment prior to any certification as a class action. At this point, he was no longer a member of the class of recipients having

a dispute with the Social Security Administration concerning the recoupment of overpayments. Because the plaintiff is no longer a member of said class, he cannot "fairly and adequately protect the interests of the class" as required. Fed. R.Civ. P. 23(a)(4).

This Court has dealt with this question in *Norman* v. *Connecticut State Board of Parole,* 458 F.2d 497 (2d Cir. 1972). There a parolee claimed the right to counsel at a parole revocation hearing and instituted a class action to enjoin further hearings without such representation. An injunction issued, but while the federal appeal was pending, the criminal charges were nolled by the Connecticut state court, so that the named plaintiff no longer faced either state charges or the consequent parole revocation hearing. The Court thought it "clear that a named plaintiff cannot bring suit for a class of which he is not a part," 458 F.2d at 499, and dismissed the action subject to intervention by another proper party. See also, *Geraci* v. *Treuchtlinger,* 487 F.2d 590 (2d Cir. 1973) (3-4a).

Similarly, Judge Blumenfeld in *La Reau* v. *Manson,* 383 F. Supp. 214 (D. Conn. 1974) refused to allow the named plaintiffs, once inmates at the Community Correctional Center in Hartford, Connecticut, but subsequently released or transferred, from proceeding in a class action challenging conditions at the Center. In light of *Norman, supra,* plaintiffs' release from the custody of which they complained made them inadequate representatives of the class they sought to represent (4a).

While *Norman, supra,* may not preclude a named plaintiff in special circumstances from pursuing the claim of a class of which he is no longer a member, see *Vaughan* v. *Bower,* 313 F. Supp. 37 (D. Ariz. 1970), *aff'd,* 400 U.S. 884 (1970), this is not such a case. In *La Reau* v. *Manson,*

383 F. Supp. 214 (D. Conn. 1974), plaintiffs could not be familiar with the changing conditions at a place in which they were no longer confined. Here the plaintiff is lacking not in knowledge, but in adversity. His stake in this matter is no greater than that of any other Social Security recipient who fears that some day, for some reason, his benefits might be reduced (4a).

Accordingly, plaintiff's motion for certification as a class action was properly denied.

CONCLUSION

This case is moot with respect to John Zito, the named plaintiff. In addition, the case cannot be properly maintained as a class action. The motion to dismiss should be affirmed.

Respectfully submitted,

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KENNETH R. DAVIS
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APPENDIX

INDEX TO APPENDIX

MEMORANDUM OF DECISION

(Filed November 15, 1974)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

RULING ON DEFENDANTS' MOTION TO DISMISS

The named plaintiff in this action, John Zito, was notified in February, 1972, that because of an overpayment he had received in Social Security benefits, his future payments were to be reduced. In May, 1974, he was told that the reductions would begin in July of this year and continue until February, 1976. Plaintiff brought this suit to challenge the power of the United States Department of Health, Education and Welfare (H.E.W.) to order payment reductions without a prior hearing. On July 31, this Court approved an agreement between the parties that continued full payments to the plaintiff pending a reconsideration of the reduction by H.E.W. During the period in which the agreement was in effect, the plaintiff filed a motion for certification as a class action. In September H.E.W. notified Zito that the claim of overpayment, prompting both the planned reduction of benefits and this lawsuit, had been entirely withdrawn. Thereafter H.E.W. moved to dismiss.

H.E.W. claims that as to plaintiff Zito this case is now moot. Perhaps if the Department had done no more than grant plaintiff a post-reduction hearing, or had even delayed reduction and granted a hearing before the resolution of this case, there might still be a case or controversy concerning plaintiff's right to a pre-reduction hearing. Granting a post-reduction hearing may not satisfy a claim to a

pre-reduction hearing, *Frost* v. *Weinberger*, 375 F. Supp. 1312 (E.D.N.Y. 1974), and the government must, in any case, demonstrate that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Where the danger of reduction continues, or the basic dispute concerning a pre-reduction hearing remains unsettled, such partial relief may not end the controversy. *Cf. Goldberg* v. *Kelly*, 397 U.S. 254, 256 n. 2 (1970).

However, H.E.W. has gone further. It has abandoned all attempts to recoup the overpayments, thereby removing the factual dispute as to which plaintiff asserts his right to a pre-reduction hearing. At this time there is no dispute between plaintiff and the Department at all. Zito's present fears are without substance; he is no more likely to experience a future reduction in benefits, with or without a hearing, than any other Social Security recipient. With the dispute as to amount of benefits ended, his suit to establish a right to a pre-reduction hearing is moot.

Plaintiff claims that even if the matter is moot as to himself, he is entitled to litigate on behalf of the class. In order to sue on behalf of others, the representative party must "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). Despite this requirement, some courts have allowed representation of a class by named plaintiffs whose individual claims are moot, see, *e.g.*, *Cleaver* v. *Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Conover* v. *Montemuro*, 477 F.2d 1073 (3d Cir. 1973); *Moss* v. *Lane Co., Inc.*, 471 F.2d 853 (4th Cir. 1973). In this District an indigent juvenile was permitted to proceed on behalf of all those not able to appeal delinquent adjudications to the Connecticut Superior Court without prior payment of a filing fee, even though she was permitted such an appeal once the federal suit was begun. *Gatling* v. *Butler*, 52 F.R.D. 389 (D. Conn. 1971).

Memorandum of Decision (Filed November 15, 1974)

Whatever the rule in other Circuits, in the Second Circuit *Gatling* is apparently no longer good law. In *Norman* v. *Connecticut State Board of Parole*, 458 F.2d 497 (2d Cir. 1972), a parolee claimed the right to counsel at a parole revocation hearing and instituted a class action to enjoin further hearings without such representation. An injunction issued, but while the federal appeal was pending, the criminal charges were nolled by the Connecticut state court, so that the named plaintiff no longer faced either state charges or the consequent parole revocation hearing. The Court thought it "clear that a named plaintiff cannot bring suit for a class of which he is not a part," 458 F.2d at 499, and dismissed the action subject to intervention by another party. See also, *Geraci* v. *Treuchtlinger*, 487 F.2d 590 (2d Cir. 1973).

Judge Blumenfeld, author of the *Gatling* opinion, has since recognized that *Norman* may preclude the *Gatling* result. In *LaReau* v. *Manson*, — F. Supp. — (D. Conn. 1974), he refused to allow the named plaintiffs, once inmates at the Community Correctional Center in Hartford, Connecticut, but subsequently released or transferred, from proceeding in a class action challenging conditions at the Center. In light of *Norman*, plaintiffs' release from the custody of which they complained made them inadequate representatives of the class they sought to represent.

While *Norman* may not preclude a named plaintiff in special circumstances from pursuing the claim of a class of which he is no longer a member, see *Vaughan* v. *Bower*, 313 F. Supp. 37 (D. Ariz. 1970), *aff'd*, 400 U.S. 884 (1970), this is not such a case. In *LaReau* plaintiffs could not be familiar with the changing conditions at a place in which they were no longer confined. Here the plaintiff is lacking not in knowledge, but in adversity. His stake in this matter is no greater than that of any other Social Security recipi-

ent who fears that some day, for some reason, his benefits might be reduced.

In *La Reau* the class was certified despite its "headless body," and (as in *Norman*) the action dismissed without prejudice, unless within thirty days another member of the class sought to intervene. The Court took this step in its belief that "failure to certify this as a class action could well render the issues raised in the complaint incapable of review." — F. Supp. at —. The nature of the custody in *LaReau* guaranteed that confinement would be of only short duration, so that individual claims would inevitably become moot, and individual plaintiffs would inevitably fail as representatives of the class. No such problem exists here, and no such remedy is required. *Cf. Geraci* v. *Treuchtlinger*, *supra*.

Accordingly, the motion for certification as a class action is denied, and the motion to dismiss is granted.

Dated at New Haven, Connecticut, this 15 day of November, 1974.

/s/ JON O. NEWMAN

Jon O. Newman
United States District Judge

JUDGMENT

(Filed November 26, 1974)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

This case having come on for consideration on Defendants' Motion to Dismiss and the Plaintiff's Motion for Certification as a Class Action and the Court having filed under date of November 15, 1974, its Ruling on Defendants' Motion to Dismiss, granting said motion but therein denying Plaintiff's Motion for Certification as a Class Action,

It is accordingly ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for Certification as a Class Action is denied and Defendants' Motion to Dismiss is granted.

Dated at Bridgeport, Connecticut, this 26th day of November, 1974.

SYLVESTER A. MARKOWSKI, Clerk

By /s/ VINCENT R. DEROSA

Vincent R. DeRosa
Deputy in Charge

NOTICE OF APPEAL

(Filed December 13, 1974)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

Notice is hereby given that John Zito, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment denying Plaintiff's Motion for Certification as a Class Action and granting Defendant's Motion to Dismiss, entered in this action on the 26th day of November, 1974.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-2683

JOHN ZITO
Appellant

v.

CASPER WEINBERGER, Secretary of Health, Education and Welfare et al
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street Brooklyn, N.Y.

That on the 21st day of April, 1975, deponent served the within Brief and Appendix upon John Boesen, Esq.; 342 Atlantic Street Stamford, Connecticut 06902

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 21st day of April 1975

Louis Pinto

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977